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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

SABRINA SOUIRI, et al., Plaintiffs and Appellant, v. KOVAC MEDIA GROUP, INC., et al., Defendants and Respondents.	B205198 (Los Angeles County Super. Ct. No. BC378456)

APPEAL from an order of the Superior Court of Los Angeles County, Malcolm Mackey, Judge. Reversed.

Mesisca, Riley & Kreitenberg, Dennis P. Riley, Rena E. Kreitenberg, Mike N. Vo, Patrick Mesisca, for Plaintiff and Appellant Marina Mena.

Hinshaw & Culbertson, Filomena E. Meyer, Desmond J. Hinds, for Defendants and Respondents Leader Kozmor Gorham, and James D. Kozmor.

Miller Barondess, Louis R. Miller, Mira Hashmall, Daniel S. Miller, for Defendant and Respondent Kovac Media Group, Inc.

INTRODUCTION

Plaintiff and appellant Marina Mena and Sabrina Souiri filed a complaint against Kovac Media Group, Inc., doing business as 10th Street Entertainment (Kovac Media), Jeff Varner, and Jordan Berliant alleging various employment-related causes of action.[1] The complaint also alleges a cause of action for intentional infliction of emotional distress by Mena and Souiri against Kovac Media, Varner, Leader Kozmor Gorham LLP and James D. Kozmor (Kozmor) (together, the Leader Kozmor defendants), and a cause of action for malicious prosecution by Mena against Kovac Media and the Leader Kozmor defendants.[2] Mena's malicious prosecution cause of action and part of Mena's intentional infliction of emotional distress cause of action are based on a prior action filed by the Leader Kozmor defendants on behalf of Kovac Media against Mena (the underlying action). The Leader Kozmor defendants filed a motion to strike Mena's causes of action for intentional infliction of emotional distress and malicious prosecution under the anti-SLAPP statute—Code of Civil Procedure section 425.16. Kovac Media joined the Leader Kozmor defendants' motion. The trial court granted the motion, and Mena appeals.[3] We reverse the trial court's ruling.[4]

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[1] Souiri, Varner, and Berliant are not parties to this appeal.

[2] Defendants and respondents Kovac Media and the Leader Kozmor defendants together are referred to herein as respondents.

[3] In her briefing in opposition to the anti-SLAPP motion and in oral argument in the trial court, Mena conceded the applicability of the motion as to her cause of action for intentional infliction of emotional distress to the extent that her cause of action related to the underlying action. Mena's appeal is directed solely to the trial court's ruling on her malicious prosecution cause of action. Mena has appealed the award of attorney fees and costs against her in a separate appeal.

[4] We do not reach Mena's claims with respect to certain of the trial court's evidentiary rulings as our holding would not be affected by a different outcome to any of the rulings.

BACKGROUND

Kovac Media "is in the business of personally managing the careers of recording and performing artists." From September 2005 to March 24, 2006, Mena worked as a product manager for Kovac Media. As a product manager, Mena was responsible for "scheduling and managing the daily activities . . . of several musical bands, including the New Cars."

In a declaration filed in support of Mena's opposition to respondents' anti-SLAPP motion, Mena states that during her employment at Kovac Media, she saw Varner, Kovac Media's general manager, harass Souiri, her co-worker. Mena states that Souiri left her employment with Kovac Media in January 2006, and that Souiri approached her in February 2006, to be a witness in a potential harassment lawsuit. Mena states that she agreed to testify truthfully about what she saw.

According to Mena, on March 17, 2006, a co-worker asked Mena if she had heard about a potential harassment lawsuit by Souiri and asked which party Mena would support. Mena responded that she would not take sides, but that she would tell the truth. Varner was standing nearby during this conversation and "gave a disgusted look at" Mena.

Mena further declared that, on Friday, March 24, 2006, Kovac Media terminated her employment citing "work performance problems." Mena had never been warned of any work performance problems and was surprised to be terminated. Mena states that before leaving Kovac Media that day, she spoke to Varner about her relationship with the New Cars band and that Varner told Mena that she could notify the band members of her separation. Respondents submitted evidence that Varner told Mena that she was not to contact Kovac Media's clients and that she agreed. It is undisputed that on Sunday, March 26, 2006, Mena sent an email to the members of the New Cars band to notify them of her separation from Kovac Media. That email states:

"Hi Fellas,

"I wanted to write you and tell you personally that I am longer working for 10th Street Entertainment as of last Friday afternoon, at their request. Apparently, my

professionalism didn't fit in with their yelling and chaos. In all honesty, I believe it's more to do with my not kissing Allen's rear at every moment. As you may already know and have experienced first hand, he doesn't handle being questioned very well. For me, self-respect and integrity are everything in life and so I didn't play their role. I'm sure their spin is a different story.

"I have grown very fond of each of you over the past few months and please know that it has been my pleasure to work with such great talent. I feel honored to have participated in this project and in all the elements that helped make it come together. . . . The photo shoot, the 'secret' shows, live record, and finally the launch that we all worked so hard for. I wish you much success in this upcoming tour and maybe, if allowed, I'll come see you at the Gibson Amphitheatre! I do have one personal request and hope it isn't out of line. Would it be possible, if necessary, that I could list you as a reference [*sic*]? I'd be very grateful but would also understand if you felt uncomfortable with such a request.

"Let's stay in touch . . . I'd love to hear how things turn out and to hear all about the antics of the road.

"Love and friendship,

"Marina Mena."

On March 28, 2006, Kovac Media, represented by the Leader Kozmor defendants, filed the underlying action against Mena alleging causes of action for intentional interference with business relations, unfair competition, and trade libel. The complaint alleges, among other things, that on March 26, 2006, Mena sent an email message to Kovac Media's clients in which she "sought to disrupt the relationships between [Kovac Media] and its clients by attacking the integrity and professionalism of [Kovac Media]."

During the ensuing litigation, Kovac Media served Mena with three sets of form interrogatories, one set of special interrogatories, and two sets of requests for production of documents. Kovac Media also took Mena's deposition over two days. Mena served Kovac Media with one set each of form interrogatories, special interrogatories, and requests for production of documents. Mena took Varner's deposition.

In his October 17, 2006, deposition, Varner testified that Mena did not take any of Kovac Media's clients and that he had no information that she was trying to take any of "these clients for herself." Varner further testified that other than the email, he had no non-privileged information that Mena was trying to get the "band" to leave Kovac Media or to break up.

On November 21, 2006, Mena filed a motion for summary judgment with respect to the underlying action. That same day, Kovac Media filed a request for dismissal of the underlying action without prejudice.

On October 2, 2007, Mena filed the present action in which she alleged the cause of action for malicious prosecution against Kovac Media and the Leader Kozmor defendants. On November 30, 2007, the Leader Kozmor defendants filed their anti-SLAPP motion to strike Mena's eighth and ninth causes of action for intentional infliction of emotional distress and malicious prosecution. On December 3, 2007, Kovac Media joined the Leader Kozmor defendants' motion.

The trial court granted the anti-SLAPP motion. At oral argument, the trial court found that the voluntary dismissal of the underlying action did not terminate that action on the merits in Mena's favor and that there was probable cause to file and prosecute the underlying action against Mena because her March 26, 2006, email made disparaging statements about Kovac Media. The trial court expressly did not rule on whether respondents acted with malice in filing or prosecuting the underlying action, stating, "I'm not going to get into the malice issue." The trial court subsequently filed a written order, submitted by counsel for the Leader Kozmor defendants, granting the anti-SLAPP motion. In that written order, in addition to finding that Mena failed to demonstrate a favorable termination of the underlying action or the lack of probable cause to file or prosecute the underlying action, the trial court also found that "the 'indifference' alleged is not adequate to prove malice for purposes of malicious prosecution." The trial court did not make such a finding concerning "indifference" at oral argument. Instead, in response to Mena's counsel's statement that malice also includes indifference, the trial

court stated, "Indifference doesn't seem to be malice. . . . [¶] . . .[¶] I mean logically it doesn't seem to be malice."

DISCUSSION

Mena contends that the trial court erred in granting respondents' anti-SLAPP motion because she demonstrated a probability of prevailing on her malicious prosecution claim. We agree.

"'A SLAPP suit—a strategic lawsuit against public participation—seeks to chill or punish a party's exercise of constitutional rights to free speech and to petition the government for redress of grievances. [Citation.] The Legislature enacted Code of Civil Procedure section 425.16—known as the anti-SLAPP statute—to provide a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. [Citation.]' (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055-1056 [39 Cal.Rptr.3d 516, 128 P.3d 713].)" (*Rohde v. Wolf* (2007) 154 Cal.App.4th 28, 34.)

"In considering the application of the anti-SLAPP statute, courts engage in a two-step process. '"First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim."' (*Taus v. Loftus* (2007) 40 Cal.4th 683, 712 [54 Cal.Rptr.3d 775, 151 P.3d 1185], ellipsis in original, quoting *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 [124 Cal.Rptr.2d 507, 52 P.3d 685] (*Equilon*).) '"'The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue. [Citation.]' [Citation.]" [Citations.]'" (*Rohde v. Wolf, supra,* 154 Cal.App.4th at pp. 34-35.)

"The plaintiff's showing of facts must consist of evidence that would be admissible at trial. [Citation.] The court cannot weigh the evidence, but must determine whether the evidence is sufficient to support a judgment in the plaintiff's favor as a matter of law, as on a motion for summary judgment. [Citations.] If the plaintiff presents a sufficient prima facie showing of facts, the moving defendant can defeat the

plaintiff's evidentiary showing only if the defendant's evidence establishes as a matter of law that the plaintiff cannot prevail. [Citation.]" (*Hall v. Time Warner, Inc.* (2007) 153 Cal.App.4th 1337, 1346.)

"[']"Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute – i.e., that arises from protected speech or petitioning *and* lacks even minimal merit – is a SLAPP, subject to being stricken under the statute." [Citation.]' (*Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 456 [125 Cal.Rptr.2d 534].) Our review of the denial of a motion to strike under the anti-SLAPP statute is de novo. (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 [46 Cal.Rptr.3d 638] [*Soukup*]; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 [46 Cal.Rptr.3d 606] (*Flatley*).)" (*Rohde v. Wolf, supra,* 154 Cal.App.4th at p. 35.)

"'To establish a cause of action for the malicious prosecution of a civil proceeding, a plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's, favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations].' [Citation.]" (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 676.) "[C]ontinuing to prosecute a lawsuit discovered to lack probable cause" also may support a malicious prosecution action. (*Zamos v. Stroud* (2004) 32 Cal.4th 958, 973.)

Mena does not dispute and there is no question that respondents meet the first prong of the two-part test because Mena's malicious prosecution claim is based on the filing of the underlying action. (*Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 741.) Thus, we turn to the second prong of the test and decide whether Mena demonstrated a probability of prevailing on her malicious prosecution claim. As noted, a probability of prevailing is established if the plaintiff presents a sufficient prima facie case. The defendant can only overcome such a showing if its evidence establishes as a matter of law that the plaintiff cannot prevail at trial. (*Hall v. Time Warner, Inc., supra,* 153 Cal.App.4th at p. 1346.)

A. Mena Presented Evidence Demonstrating A Probability Of Prevailing On The Issue Of Whether The Underlying Action Was Terminated In Her Favor

"A '"favorable" termination does not occur merely because a party complained against has prevailed in an underlying action. While the fact he has prevailed is an ingredient of a favorable termination, such termination must further reflect on his innocence of the alleged wrongful conduct. If the termination does not relate to the merits—reflecting on neither innocence of nor responsibility for the alleged misconduct – the termination is not favorable in the sense it would support a subsequent action for malicious prosecution.' (*Lackner v. LaCroix* (1979) 25 Cal.3d 747, 751 [159 Cal.Rptr. 693, 602 P.2d 393] (*Lackner*).) '"[W]hen the underlying action is terminated in some manner other than by a judgment on the merits, the court examines the record 'to see if the disposition reflects the opinion of the court or the prosecuting party that the action would not succeed.'" [Citations.]' (*Ross v. Kish* (2006) 145 Cal.App.4th 188, 198 [51 Cal.Rptr.3d 484] (*Ross*).) 'Should a conflict arise as to the circumstances of the termination, the determination of the reasons underlying the dismissal is a question of fact. [Citation.]' (*Ibid.*)" (*Sycamore Ridge Apartments LLC v. Naumann* (2007) 157 Cal.App.4th 1385, 1399 (*Sycamore Ridge*).)

"A voluntary dismissal is presumed to be a favorable termination on the merits, unless otherwise proved to a jury. (*Weaver v. Superior Court* (1979) 95 Cal.App.3d 166, 185 [156 Cal.Rptr. 745], disapproved on other grounds in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 882 [254 Cal.Rptr. 336, 765 P.2d 498] (*Sheldon Appel*).) This is because '"[a] dismissal for failure to prosecute . . . does reflect on the merits of the action [and in favor of the defendant] . . . . The reflection arises from the natural assumption that one does not simply abandon a meritorious action once instituted."' (*Lackner, supra,* 25 Cal.3d at pp. 750-751.)" (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1400; *Fuentes v. Berry* (1995) 38 Cal.App.4th 1800, 1808 ["'In most cases, a voluntary unilateral dismissal is considered a termination in favor of the defendant . . . .'"].)

Because respondents voluntarily dismissed the underlying action, Mena is entitled to the presumption that the underlying action was terminated in her favor. (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1399.) Respondents attempt to defeat this presumption with evidence that purports to establish that the underlying action was dismissed for economic reasons. Respondents rely on Kozmor's declaration testimony that "The dismissal of 10th Street's complaint against Marina Mena was for reasons unrelated to the merits of 10th Street's claims against her." Respondents also rely on Varner's declaration testimony that the reason for the dismissal of the underlying action "had nothing to do with the merits of 10th Street's case against Marina Mena. . . . Among the reasons for the dismissal were the mounting costs of litigation and concern over 10th Street's ability to collect on any judgment against Ms. Mena."

Mena challenges respondents' economic reasons for dismissing the underlying action. In opposition to respondents' anti-SLAPP motion, Mena presented evidence that Kovac Media continued to litigate the underlying action actively up to the time of the dismissal. Kozmor sent Mena's counsel two letters dated November 14, 2006, one that concerns a discovery dispute over a document demand in which Kozmor states that Mena's deposition would resume absent compliance with the demand, and another that concerns Mena's failure to provide a verification for a response to document demand in which Kozmor states that he would file a motion to compel absent compliance by November 17, 2006.

Mena's challenge is plausible. It is arguable that if the economic concerns related to the underlying action were so substantial that they merited dismissing the underlying action, one reasonably would expect that respondents would not have actively prosecuted the underlying action up to the time of the dismissal. Accordingly, respondents' evidence concerning its economic reasons for dismissing the underlying action does not establish as a matter of law that Mena cannot prevail on her malicious prosecution action. Instead, that evidence, considered with Mena's contrary evidence, establishes that a triable issue

of fact exists as to whether the underlying action was terminated in Mena's favor. Such a factual dispute is for a jury to resolve.[5]

B. Mena Presented Evidence Demonstrating Under The Applicable Standard A Probability Of Prevailing On The Issue Of Whether Respondents Lacked Probable Cause To Prosecute The Unfair Competition Cause Of Action[6]

The issue of probable cause is determined by whether, viewed objectively, the prior action was legally tenable when it was filed or while it was being prosecuted. (*Soukup, supra,* 39 Cal.4th at p. 292; *Zamos v. Stroud, supra,* 32 Cal.4th at p. 973; *Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1402.) "'A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him.' [Citation.]" (*Soukup, supra,* 39 Cal.4th at p. 292; *Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1402 ["The test the court is to apply is whether 'any reasonable attorney would have thought the claim tenable . . . .' [Citation.]"].) In deciding whether the prior action was legally tenable, a court construes the allegations of the prior complaint liberally, in a light most favorable to the malicious prosecution defendant. (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1402.) As stated in *Soukup, supra,* 39 Cal.4th at page 292, "[p]robable cause, moreover, must exist for every cause of action advanced in the underlying action. '[A]n action for malicious prosecution lies

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[5] Because we hold that respondents' active litigation of the underlying action up to the time of their voluntary dismissal sufficiently places at issue whether the underlying action was dismissed for economic reasons, we need not also address certain claims Mena advances concerning the timing of her filing of her summary judgment motion and the filing of respondents' dismissal.

[6] Because we hold that respondents did not have probable cause to continue to prosecute the unfair competition cause of action as we note, we need not also address whether probable cause existed to file or to continue to prosecute the intentional interference with business relations and trade libel causes of action. (*Soukup, supra,* 39 Cal.4th at p. 292.)

when but one of alternate theories of recovery is maliciously asserted . . . .' [Citations.]" Thus, we focus on one cause of action—the unfair competition cause of action.

California's Unfair Competition Law, Business and Professions Code section 17200, et seq., defines "unfair competition" to "mean and include any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by" the false advertising law commencing with Business and Professions Code section 17500. (Bus. & Prof. Code, § 17200.) The purpose of the unfair competition law is "to protect both *consumers* and *competitors* by promoting fair competition in commercial markets for goods and services. [Citation.]" (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 949, italics added; *Linear Technology Corp. v. Applied Materials, Inc.* (2007) 152 Cal.App.4th 115, 135 [holding that an action under the Unfair Competition Law did not lie where the alleged victim was neither a competitor nor a consumer].)

Mena presented evidence that respondents lacked probable cause to prosecute the unfair competition cause of action. As early as October 17, 2006, Varner, in his deposition testimony, admitted that Mena had not taken any of Kovac Media's clients and that he had no information that she was trying to take any of "these clients for herself." Varner also admitted that other than the email, he had no non-privileged information that Mena was trying to get the "band" to leave Kovac Media or to break up. Accordingly, even if respondents reasonably believed that the unfair competition cause of action was legally tenable when they filed the underlying action, Varner's deposition testimony made clear that there was no probable cause for respondents to continue to prosecute that cause of action after October 17, 2006. At least by that time, respondents knew that Mena and Kovac Media were not business competitors and that Kovac Media was not a consumer under the Unfair Competition Law. There was nothing to suggest that Mena would compete with Kovac Media to serve as the band's personal manager. Continuing to prosecute an action with no basis for doing so can satisfy the lack of probable cause requirement for a malicious prosecution action. (*Zamos v. Stroud, supra*, 32 Cal.4th at p. 960 [holding that the malicious prosecution plaintiff made a sufficient showing to defeat

the defendant's anti-SLAPP motion by demonstrating that the defendant attorneys continued to prosecute the underlying action after discovering it was without probable cause].) Respondents continued to prosecute the underlying action, including the unfair competition cause of action, up to the November 21, 2006, dismissal of the underlying action.

C. Mena Presented Evidence Demonstrating A Probability Of Prevailing On The Issue Of Whether Respondents Acted With Malice In Prosecuting The Underlying Action

Malice concerns the intent or purpose with which the defendant brought the prior action. (*Soukup, supra,* 39 Cal.4th at p. 292.) The plaintiff must demonstrate that the defendant acted with actual ill will or some improper purpose. (*Ibid.*) "Malice 'may range anywhere from open hostility to indifference. [Citations.]'" (*Soukup, supra,* 39 Cal.4th at p. 292.) "Since parties rarely admit an improper motive, malice is usually proven by circumstantial evidence and inferences drawn from the evidence." (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 218.) "While the mere absence of probable cause, without more, 'is not sufficient to demonstrate malice' (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 498-479, fn. 29[78 Cal.Rptr.2d 142]), '"[m]alice may also be inferred from the facts establishing lack of probable cause." [Citation.]' (*Soukup, supra,* 39 Cal.4th at p. 292.) . . . '[T]he extent of a defendant attorney's investigation and research may be relevant to the further question of whether or not the attorney acted with malice.' (*Sheldon Appel, supra,* 47 Cal.3d at p. 883.)" (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1409.)

1. Kovac Media

Mena presented evidence that Kovac Media acted with malice in filing and prosecuting the underlying action. According to Mena's declaration, on March 17, 2006, she told a co-worker, in Varner's presence, that she would not takes sides, but would tell the truth in Souiri's potential harassment lawsuit. According to Mena, Varner gave her a

"disgusted" look. One week later, on March 24, 2007, Kovac Media terminated Mena's employment citing "work performance problems" despite not having previously warned Mena of any work performance problems. Two days later, on March 26, 2007, Mena sent the email to the members of the New Cars band, notifying them of her separation from Kovac Media. Two days after that, on March 28, 2006, Kovac Media, represented by the Leader Kozmor defendants, filed the underlying action against Mena alleging the cause of action for unfair competition.

Mena argues, in part, that the evidence demonstrates that the underlying action against her was filed in retaliation for her agreement to testify in a harassment lawsuit by Souiri. The underlying action was filed within a week of learning of Mena's agreement to testify and only two days after Mena's email to the New Cars Band. As discussed above, Mena presented evidence that the unfair competition cause of action was prosecuted without probable cause. Given the timing of the above events, the filing of the underlying action with its cause of action for unfair competition is evidence that the underlying action was filed in retaliation for Mena's agreement to testify truthfully in any harassment action by Souiri and was filed in retaliation for Mena's March 26, 2006, email to the New Cars Band.

In support of the anti-SLAPP motion, the Leader Kozmor defendants submitted Varner's declaration in which he stated that he did not overhear Mena discuss with a co-worker a potential harassment lawsuit by Souiri and that he was not aware, prior to the filing of the underlying action, that Mena offered to testify on Souiri's behalf in any claim or potential action against 10th Street Entertainment. Varner also stated that, prior to the filing of the underlying action, he did not inform Kozmor or anyone at Leader Kozmor that Mena had indicated that she would be a witness in any claim Souiri brought against 10th Street Entertainment.

Respondents' evidence fails to establish as a matter of law that Mena cannot prevail on her malicious prosecution action. Instead, that evidence, considered with Mena's contrary evidence, establishes that a triable issue of fact exists as to whether

Kovac Media acted with malice in prosecuting the underlying action. Such a factual dispute is for a jury to resolve.

2. The Leader Kozmor Defendants

Mena presented evidence that the Leader Kozmor defendants prosecuted the unfair competition cause of action with malice because they continued to prosecute that cause of action after they knew or should have known that it was untenable. (*Sycamore Ridge, supra,* 157 Cal.App.4th at pp. 1409-1410.) In *Sycamore Ridge*, the LaFave law firm associated into an action in October 2004 that had been filed in June 2003 by the Naumann law firm on behalf of 45 defendants, including Shirley Powell. (*Id.* at pp. 1391-1392, 1394.) That action asserted 18 causes of action arising out of, among other things, the poor living conditions at the Sycamore Ridge Apartments. (*Id.* at pp. 1392-1393.) Powell's September 2003, discovery responses demonstrated that there was no factual basis to support a number of the causes of action alleged on Powell's behalf. (*Id.* at p. 1405.) On November 19, 2004, Powell dismissed her portion of the lawsuit without prejudice. (*Id.* at p. 1394.) On January 20, 2005, in exchange for a waiver of costs from Sycamore Ridge Apartments, Powell filed a dismissal with prejudice. (*Ibid.*) Sycamore Ridge Apartments subsequently brought an action for malicious prosecution against Powell and her attorneys. (*Id.* at p. 1391.)

The trial court granted the LaFave law firm's subsequent anti-SLAPP motion, stating, "'[I]t appears the LaFave defendants joined in the underlying case only two months before the case was dismissed and nine days after Powell had requested that her case be dismissed. There is no evidence presented that the LaFave defendants continued to prosecute her case or did anything during this time.'" (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1396.) Sycamore Ridge Apartments appealed.

Addressing malice, the Court of Appeal stated, "The complaint in this case contains a number of claims that are clearly untenable. If the LaFave defendants knew the relevant facts and did not take immediate steps to dismiss Powell's unmeritorious claims, one could infer that the continued prosecution of those claims was motivated by a

malicious intent." (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1409.) The Court of Appeal observed, "Maintaining a case one knows, or should know, is untenable continues to harm the defendant as long as the case remains open, since the defendant must continue to prepare a defense to the case as long as the case appears to be moving forward." (*Id.* at p. 1410.)

Among other claims, the Court of Appeal rejected the LaFave defendants' claims that their role in the underlying action was limited to the "'mold exposure aspects of the litigation'" and that they were "'not involved in deciding which plaintiffs to include in the lawsuit.'" (*Sycamore Ridge, supra,* 157 Cal.App.4th at p. 1410.) The Court of Appeal held that the LaFave defendants' "protestations that they believed the claims in the lawsuit were supported by probable cause and that they harbored no malice do not establish, as a matter of law, that Sycamore Ridge cannot prevail on these elements of its malicious prosecution action. None of the LaFave defendants' assertions negate the fact that they formally associated into the case and that Powell's claims remained active for approximately a month after their entry into the case, despite the obvious failings of Powell's complaint." (*Id.* at p. 1411)

In this case, malice on the part of the Leader Kozmor defendants can be inferred from the failure to dismiss the unfair competition claim after Varner admitted, in effect, the lack of a factual basis for that cause of action in his October 17, 2006 deposition. (*Zamos v. Stroud, supra,* 32 Cal.4th at p. 973.) Notwithstanding Varner's October 17, 2006, deposition testimony discussed above, in which he admitted he had no information that would suggest unfair competition, Kovac Media did not file its request for dismissal of the underlying action until 35 days later on November 21, 2006.[7]

In *Sycamore Ridge, supra,* 157 Cal.App.4th at page 1411, the Court of Appeal found malice where the LaFave defendants merely allowed the underlying action to remain active for "approximately a month" after entering the case. Here, the Leader

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[7] Such evidence also demonstrates malice by Kovac Media.

Kozmor defendants not only allowed the unfair competition cause of action to remain active for 35 days – "approximately a month" – after learning that there was no factual basis for that claim, they continued to prosecute the case during that period by sending discovery demand letters just before dismissing the underlying action.

The threshold to defeat an anti-SLAPP motion is low—a "plaintiff need only establish that his or her claim has 'minimal merit' to avoid being stricken as a SLAPP." (*Soukup, supra,* 39 Cal.4th at p. 291.) Mena's showing at this stage of malice on the part of the Leader Kozmor defendants satisfies that "minimal" standard. There are many circumstances suggesting a lack of malice. But in determining this motion, we look to see if plaintiff has submitted enough facts to establish a prima facie case that is not defeated as a matter of law by defendant's evidence. That Mena satisfied in this SLAPP proceeding the malice showing with respect to the Leader Kozmor defendants does not suggest that the Leader Kozmor defendants cannot prevail in proceedings hereafter.

D. Kovac Media's Joinder Argument

Kovac Media contends that Mena forfeited appellate review of the trial court's order granting the anti-SLAPP motion with respect to Kovac Media because Mena challenged Kovac Media's joinder in the Leader Kozmor defendants' anti-SLAPP motion on technical grounds and did not also file a "substantive opposition" to the joinder in the form of a substantive defense to the anti-SLAPP motion. Kovac Media joined the Leader Kozmor defendants' anti-SLAPP motion on the basis that it was "situated similarly with the Leader Kozmor Defendants with regard to the Ninth Cause of Action for Malicious Prosecution." Mena substantively opposed that motion. Fairly construed, Mena's substantive opposition to the anti-SLAPP motion included opposition to Kovac Media's motion. Kovac Media cites no authority for its apparent contention that, by virtue of Kovac Media's joinder, Mena was required to address issues not contained in the Leader Kozmor defendants' anti-SLAPP motion. Instead, Kovac Media relies on two cases – *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468 and *In re Dakota S.* (2000) 85 Cal.App.4th 494, 501 – that address the general rule that contentions not raised in the trial

court will not be considered on appeal. Neither case addresses Kovac Media's joinder argument. As Kovac Media joined the Leader Kozmor defendants' anti-SLAPP motion without adding any contentions, it is limited to the contentions made in that motion. It is those contentions that we have addressed in this appeal.

DISPOSITION

The order is reversed. Mena is awarded her costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MOSK, J.

We concur:

TURNER, P. J.

KRIEGLER, J.